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In the

Supreme Court of the United States

CITIZENS FOR THE APPROPRIATE PLACEMENT OF THE COMMUNICATION FACILITIES, ET AL.

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Second Circuit

AMICUS CURIAE BRIEF OF CITIZENS FOR OPEN PROCESS IN ANTENNA SITING, SAN RAFAEL HILL TOWER COMMITTEE, COUNCIL ON WIRELESS TECHNOLOGY IMPACTS AND SAN FRANCISCO NEIGHBORHOOD ANTENNA-FREE UNION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Interests of the Amici Curiae

Amici Curiae are "Citizens for an Open Process in Antenna Siting" ("COPAS"), "San Rafael Hill Tower Committee," "Council on Wireless Technology Impacts," and San Francisco Neighborhood Antenna-Free Union" ("SNAFU") of Marin and San Francisco Counties in the State of California.[1] Amici are organizations which have participated in local government decision-making with regard to the siting of telecommunications facilities. Amici have received the written permission of the parties and intervenors to file a brief in support of the petition. Amicus "Council on Wireless Technology Impacts" is a non-profit consulting and educational organization devoted to the issue of informing citizens and government on the potential health impacts from wireless technologies, including cellular phones, personal communications systems, radio and television broadcasts, and other forms of wireless communication. Each of the Amici has encountered great reluctance and at times outright prohibitions from local governmental bodies to consider input to the siting of telecommunications facilities based on health considerations. The resistance by local government to even hear public comments on health considerations is born from the perceived preemptive effect of Section 704 of the Telecommunications Act of 1996. 47 U.S.C. § 332(c)(7)(B)(iv). Amici agree with the petitioners that section 704 of the Telecommunications Act of 1996 violates the Tenth Amendment to the United States Constitution and unduly interferes with state and local government decisions that are traditionally within the realm of protection of local health and safety interests. Moreover, the decision of the Second Circuit Court of Appeals in *Cellular Phone Task Force v. FCC,* 205 F.3d 82 (2d Cir. 2000)(reproduced at

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[1] Counsel for Amici Curiae herein has prepared the brief on behalf of the Amici and no other person or entity has made a monetary contribution in whole or in part to the cost of its preparation.

Petitioners' Appendix ("A") at A-1) will have the effect of chilling public participation in environmental decisions of local governments and undermines the State of California's statutory requirements that local governments analyze and evaluate the environmental health effects of proposals which they must approve under the California Environmental Quality Act. Cal. Pub. Res. Code §§ 21000-21177.

Summary of the Argument

Local and state governments have a strong interest in the protection of the health and safety of their citizens. The police power of the state can be invoked to protect citizens when health and safety protections are threatened. The proliferation of cellular telephones across the nation is causing more and more local governments to face the issue of where to place all of the antennas needed to support the millions of cellular telephones now in use. The Telecommunications Act of 1996 is interfering with the traditional decision making authority of local governments because of the perceived preemptive effect of section 704 of the Act. Local government planning bodies are being advised that they may not consider, nor may they listen to public comments concerning the health effects of telecommunications facilities.

Under California law, local and state governments are required to analyze and evaluate the potential environmental impacts from their own proposed actions and those actions by private citizens or entities that must be approved by local or state government. The lead agency must prepare environmental documentation evidencing its evaluation of the environmental effects of the proposal under the California Environmental Quality Act ("CEQA"). Cal. Public Resources Code §§ 21000-21177. The lead agency must evaluate the potential impacts of the proposal on human beings and the public has a right to participate in the evaluation process by oral and written comments. Local

governments in California are not evaluating, nor are they considering the potential environmental impacts from telecommunications facilities because of the perceived preemptive effect of section 704 of the Telecommunications Act of 1996. The body of scientific research on potential health effects from telecommunications facility emissions supports a "fair argument" under CEQA that such impacts must be analyzed and evaluated. Public participation in the CEQA process is being chilled based on local governments' refusal to consider these health effects. Therefore, the Act is unduly interfering with the dictates of state law with regard to analyzing environmental impacts from telecommunications facilities on humans under California law.

The Tenth Amendment to the U.S. Constitution, the Necessary and Proper Clause and the Commerce Clause cannot be used by the Congress to compel states to require or prohibit acts. The Telecommunications Act of 1996 is constitutionally infirm because it seeks to prohibit state and local governments from considering the health effects from telecommunications facilities. Congress has dealt with this dilemma in the past by passing federal environmental legislation that allows states to enforce federal environmental standards while preserving the states' right to adopt more stringent standards. This accomplishes the federal goals but does not unreasonably interfere with state interests.

Local governments are applying the perceived preemptive effect of section 704 of the Telecommunications Act of 1996 prohibiting them from considering environmental effects from private wireless telecommunications facilities that are in compliance with FCC emissions standards to public telecommunications facilities. The plain language of section 704 of the Act regulates "personal wireless service facilities" only and in no way affects public wireless facilities. Nonetheless, local governments, confused about the application of the Telecommunications Act, are refusing to consider health effects from facilities to which the act clearly does

not apply. This is further evidence of the unconstitutional intrusion by the Act into areas of local concern.

Argument

A. Local Government Has a Traditional Role in Protecting Health and Safety

Traditionally, local and state governments have a strong interest in the protections of the health and safety of their citizens. See *Wisconsin Public Intervenor, et al. v. Ralph Mortier, et al.*, 501 U.S. 597, 615 (1991). The police power of the state and local government can be invoked to protect health and safety of the citizens when they are threatened. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926). Local governments, in particular, use the exercise of the police power in the area of land use decisions to protect the health and safety of citizens and to promote land use policies. The federal government is neither empowered nor well suited to deal with land use issues at the local government level. Traditional principles of federalism reserve to the states and local governments decision making authority on health and safety issues that affect their citizens. Therefore, the federal government should only intrude on local issues dealing with health and safety if there is a compelling federal governmental interest and such intrusion does not run afoul of the Tenth Amendment protections and principles of federalism.

The proliferation of telecommunications facilities across this country, especially cellular telephone antenna sites, is pressuring local governments to find more and more suitable sites for these antennas. The number of cellular phones in this country has increased from 345,000 in 1985 to over 50,000,000 in 1998. The number is expected to double in the year 2000. Press Release from U.S. Department of Transportation, Office of Public Affairs, January

7, 1998. This proliferation of cellular phones has been accompanied by a corresponding proliferation of antenna facilities to transmit their signals. Cellular phone companies are placing these antennas in residential areas, on schools, churches, near hospitals, and in fact, any available site so they can provide uninterrupted cell phone coverage. Local government planning commissions are finding requests for siting of wireless communications facilities are a major part of their workload.

The Telecommunications Act of 1996 is interfering with the traditional role of local governments in siting decisions within their jurisdiction because the wireless telecommunications industry is using the Act to support discrimination claims and claims of improper decision making by local government based on health considerations. See for example, *Cellular Telephone Company et al. v. Zoning Board of Adjustment of the Borough of HO-HO-KUS, New York et* al., 197 F.3d 64 (3d Cir. 1999)(case remanded with instructions to review gap in service requirements under Telecommunications Act); *Sprint Spectrum, L.P. et al. v. Board of County Commissioners of Jefferson County,* 59 F.Supp. 2d 1101 (D.C. CO. 1999)(Board decision upheld as there was no evidence that Board favored one supplier over another); *SBA Communications, Inc. v. Zoning Commission of the Town of Brookfield,* 112 F.Supp. 2d. 233 (D. Conn. 2000) (denial of antenna application based on health and safety concerns reversed). Local governments are placed in an impossible position, trying to fulfill the mandate to protect health and safety, but handicapped by the perceived preemptive effect of the Telecommunications Act of 1996. Local planning commissions, city councils and county boards of supervisors are being advised not only that they cannot consider health effects from radio frequency radiation ("RFR") but also that they may not even listen to presentations by concerned citizens lest such information find its way into the public record and taint the decision making process. Such advice is causing a crisis of confidence in local government

caused by a federal statute seemingly designed to protect the telecommunications industry.

In San Francisco, for example, the City and County of San Francisco has adopted Wireless Telecommunications Services Guidelines for the placement of antennas. The guidelines do not take into consideration the health and safety effects of RFR. As such, the City Planning Commission routinely refuses to consider any input from citizens on the issue of health effects from RFR. The City is also preventing the consideration of health effects in the development of long-range plans by the City-chartered Telecommunications Commission. Representatives from amicus SNAFU have been literally advised that they cannot speak at the Telecommunications Commission hearings on the issue of health effects from telecommunications facilities. Representatives from amicus COPAS were told not to raise health concerns before the Planning Commission of the Town of Tiburon, California. Such prohibitions have a chilling effect on public participation in local government decisions and undermine the local governments' authority to protect citizens from threats to health and safety.

B. The Telecommunications Act of 1996 Unduly Interferes with Responsibilities of Local Government Under the California Environmental Quality Act

Under the California Environmental Quality Act (Cal. Public Resources Code § 21000-21177), local governmental bodies are required to analyze and evaluate the environmental impacts of proposals requiring their approval. Cal. Public Resources Code § 21080. The lead agency for such analysis must determine, based on a substantial evidence test, whether sufficient evidence exists to prepare a detailed environmental impact report of the potential environmental impacts from the proposed action. Id. at § 21080(d).

One of the primary considerations of the governmental agency in deciding if there are environmental effects is whether the potential environmental impacts of the proposal will cause substantial adverse effects on human beings, either directly or indirectly. Id. at § 21083(c). A key provision of the California Environmental Quality Act is public participation in the review and commenting on environmental impacts of the proposed action. Id. at § § 21091-21092. The governmental agency preparing the environmental impact report must respond to comments from the public in writing. Id. An environmental impact report that fails to address environmental impacts on the health of a human being from the proposal would be fatally defective and subject to being challenged in state court through an administrative mandamus process. Id. at § 21167. The public participation and judicial challenge processes of the California Environmental Quality Act are well used by the citizens of California to challenge governmental decisions that fail to adequately consider the potential environmental consequences of proposed actions, much like the processes established under the comparable federal National Environmental Policy Act. 42 U.S.C. § 4321-4370e.

In several cases in California, where local governments are required to analyze the environmental impacts of proposals, the local governments have refused to consider, in the environmental impact reports prepared under the California Environmental Quality Act, the environmental impacts of RFR on the health of human beings. Citizens have submitted comments to such reports but the governmental bodies have refused to consider any health effect information, indicating that such consideration is not allowed if the facilities meet the FCC standards for RFR emissions. In fact, the governmental bodies are refusing to evaluate health effects in the environmental impact reports, stating merely that the facilities will meet FCC requirements, and, therefore, no consideration of health effects is required. This position, fostered by the perceived

preemptive effect of section 704 of the Telecommunications Act of 1996, has cut off debate and consideration at the local level of potential health effects from RFR exposure.

The California Environmental Quality Act requires a full analysis of the environmental impacts of a proposal if a "fair argument" can be made that environmental impacts will result from the proposed action. *Leonoff v. Monterey County Board of Supervisors* (1990) 222 Cal.App.3d 1337, 1348. The "fair argument" standard is roughly comparable to the "hard look" doctrine for reviewing environmental documents under the National Environmental Policy Act of 1969. See e.g. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373-374 (1989); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). However, the "fair argument" standard is much less strict than the "hard look" doctrine, in that any reasonable and legitimate argument that a potentially significant environmental impact may result from the proposed action is sufficient to require the governmental agency to prepare new documentation addressing the potential environmental impacts pressed upon the governmental agency through the public input process. *Leonoff, supra,* 222 Cal. App. 3d at 1348. Mitigations for the potential impacts must be evaluated and implemented by the governmental body unless a statement of overriding consideration determines that the impacts cannot be mitigated and the decision makers believe that specific overriding economic, legal, social, technological , or other benefits outweigh the significant effects on the environment. Cal. Public Resources Code § 21081(b). In the case of health considerations from RFR exposure, the petition provides numerous examples of studies and internationally adopted standards that recognize and protect against non-thermal health effects from RFR emissions. These studies are more than sufficient to satisfy the criteria under California law that a "fair argument" can be made that there is a potential for an environmental impact on human beings from RFR.

Since the original petition was filed in this action some very important new information has been developed that should add to the compelling data already in existence that RFR causes deleterious effects on human health. In June 2000, a number of eminent scientists and government officials participated in a conference in Salzburg, Austria entitled the "International Conference on Cell Towers & Public Health." The international conference was convened by the State of Salzburg and attended by prominent scientists, public health officials and citizens from around the world. The panel of scientists who presented their original research and studies on RFR at the meeting agreed on a resolution setting standards on Mobile Telecommunications Base Stations. The central point of this resolution is to call for a sharply reduced exposure limit to the combined emissions from all high frequency radiation sources. The recommended standard by the scientific community assembled in Austria was for an exposure limit many times more stringent than the current exposure limit set by the FCC, 10 uW/cm2 as compared to 100 mW/cm2.

There are also some recent research findings further linking the exposure to RFR and adverse effects on human health. Alexander A. Borbely, et al. published a study in *Neuroscience Letters* (1999) titled "Pulsed high-frequency electromagnetic field affects human sleep and sleep electroencephalogram." Dr. Borbely and his colleagues reports that sleep patterns and electroencephalogram (EEG) readings are altered with 900 MHz cell phone exposures during sleep. Alternating fifteen minute on-and-off intervals with RF exposure produced a reduction in the amount of waking after sleep onset from eighteen minutes to twelve minutes. In addition spectral power of the EEG in non-rapid eye movement sleep was increased. The maximum rise occurred in the 10-11 Hz and 13.6-14 Hz bands during the initial part of sleep. The results demonstrate that cell phone radio frequency energy may promote sleep and modify the sleep EEG. Vera Garaj-Vrhovac reports on exposure to

microwave radiation in Volume 39, No. 13 of *Chemosphere* (1999) in an article entitled "Micronucleus Assay And Lymphocyte Mitotic Activity In Risk Assessment Of Occupational Exposure To Microwave Radiation." In this study the author reports that exposure to microwave radiation of only 10-20 uW/cm2 in workers chronically exposed to 1250-1350 MHz was sufficient to cause an increase in micronuclei, an aberrant form of DNA. Finally, A. Schirmacher, et al. published a study on the effects of RFR on the blood- brain barrier in Volume 21, No. 5 of *BioElectroMagnetics*, entitled "Electromagnetic Fields (1.8GHz) Increase the Permeability to Sucrose of the Blood-Brain Barrier In Vitro." The authors report that when an in vitro model of the blood-brain barrier was exposed to 1.8 GHz, there was an increase in permeability to sucrose across the barrier. Researchers state that for the first time a definite, reproducible effect of microwave radiation exposure on the blood-brain barrier in vitro has been achieved. The exposure conditions of this study resemble those used in mobile telecommunications. The scientific evidence is mounting that RFR can affect human health.

Nonetheless, the local governmental governments refuse to consider such evidence, based on fear that they will run afoul of the perceived preemptive effect of the federal law. Public participation in the decision making process of local government is being chilled by this federal directive. Such public right to comment upon and bring to the attention of lawmakers concerns that could affect the outcome of local government decision-making is protected speech under the First Amendment to the U.S. Constitution.

C. The Tenth Amendment, the Necessary and Proper Clause, and the Commerce Clause Do Not Allow Prohibitions on the Regulation of Telecommunications Facilities by Local Government

We agree with the petitioners that the U.S. Constitution does not allow the federal government to prohibit local governments

from regulating locally placed telecommunications facilities. This Court has ruled very recently that the Tenth Amendment, the Necessary and Proper Clause and the Commerce Clause cannot be used to compel states to require or prohibit acts, even if the federal government itself has the power to so require or prohibit such acts. *Printz v. United States*, 521 U.S. 898, 923-926 (1997). Section 704 of the Telecommunications Act of 1996 is constitutionally infirm because it seeks to prohibit states from considering health effects from RFR, despite the specific requirements of California state law the mandate local governments to consider such health effects. As the Court stated in *Printz:*

> When a "La[w] . . . for carrying into Execution" the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, *supra*, at 2376-2377, it is not a "La[w] . . . *proper* for carrying into Execution the Commerce Clause," and is thus, in the words of The Federalist, "merely [an] ac[t] of usurpation" which "deserve[s] to be treated as such." The Federalist No. 33, at 204 (A. Hamilton).

521 U.S. at 923-924. Based on these considerations, the prohibition expressed in section 704 of the Telecommunications Act of 1996 cannot pass constitutional muster.

Congress has dealt with this dilemma in the past in the arena of environmental protection. Recognizing the tension between federal policy for protection of the environment and the need to incentivize the states to implement that federal policy, the Congress passed laws that allowed the states to administer their own environmental programs by way of delegation from the federal government. See for example, Federal Water Pollution Control Act, 33 U.S.C. § 1316(c)(allowing states to enforce standards under the

Act if they are at least as stringent as the federal standards); Clean Air Act, 42 U.S.C. § 7543(b)(states may adopt standards at least as protective as federal standards); Resource Conservation and Recovery Act, 42 U.S.C. § 6926(b)(states are authorized to enact their own programs if they are equivalent to the federal program, are consistent with federal and other state programs and provide for adequate enforcement).

The scheme set forth in the Federal environmental statutes mentioned does not require or prohibit state acts. On the contrary, the federal environmental scheme encourages the states to administer their own programs but allows the states the flexibility to establish their own standards, even if they are more stringent than the federal standards. A clear example of this is found in the Court's decision in *Wisconsin Public Intervenor, et al. v. Ralph Mortier, et al.*, 501 U.S. 597 (1991). In *Wisconsin Public Intervenor*, the Court held that the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. 136 et seq., did not preempt state governments from regulating pesticides. The Court noted that not only did the Act not preempt local governments from regulating pesticides, but the Act implied a regulatory partnership between federal, state and local governments, noting that section 136t(b) of the Act required the Administrator of the Environmental Protection Agency to cooperate with "any appropriate agency of any State or any political subdivision thereof . . . ." *Wisconsin*, 501 U.S. at 615. While FIFRA does not contain the same express language of the Telecommunications Act, there are parallels to be learned from the relationship between federal laws regulating local environs and attempts to restrain states from acting in the same area. Especially in the area of health and safety, the courts should be wary of intrusion by the federal government into the local arena.

It is important to note the distinction the Third Circuit Court of Appeals has made with regard to the regulatory effect of the Telecommunications Act of 1996 in *Cellular Telephone Company,*

supra, 197 F.3d at 71. The Third Circuit states:

> The Telecommunications Act bars local regulation that prohibits or has the effect of prohibiting personal wireless services, not the facilities that provide those services. Under the right conditions, it may be possible to provide adequate level of personal wireless services to a particular community solely through facilities outside that community. We are not prepared to hold that every community must permit wireless communication facilities somewhere within its borders regardless of the need for such facilities, nor do the facts of this case require us to decide the issue now. Id.

Given overriding constitutional considerations that would restrain federal authority to prohibit consideration of health effects from telecommunications facilities, the statute may be construed not to prohibit the provision of services but merely to regulate the placement of such facilities, if the local government determines that considerations of health, safety, or other traditional local land use criteria demands such regulation.

D. Local Governments in California Refuse to Consider Health Effects From Public Telecommunications Facilities Even Though They Are Not Exempt Even Under FCC's Interpretation of the Telecommunications Act of 1996

In Marin County, California, the local governments have created a Joint Powers Authority for the purpose of providing wireless communications among fire, police, emergency services and other public entities. The system, known as the Marin Emergency Radio Authority or "MERA" is intended to provide routine and

emergency wireless telecommunications among the various local governmental agencies. The system requires the siting of seventeen large antenna towers in various parts of the County, some of which are located in or near residential neighborhoods. Each town or city where an antenna must be sited must review the MERA proposal and approve the erection of the antenna towers and the operation of the antennas. MERA has prepared an environmental impact report under CEQA that does not analyze or evaluate health effects from the proposal. MERA did not accomplish the health analysis because it understood that such analysis was preempted by section 704 of the Telecommunications Act of 1996.

The Telecommunications Act of 1996 contains a provision which seemingly prevents local communities from regulating telecommunications facilities based on the environmental effects of RFR. The relevant provision of the Act provides:

> § 332. Mobile services
> (c)(7) Preservation of local zoning authority. (A) General authority. Except as provided in this paragraph, nothing in this Act [47 USCS §§ 151 et seq.] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

Thus it is the intent of the statute not to interfere with local zoning or planning decisions with regard to "personal wireless service facilities," except as provide for in the same paragraph. It is important to note that the extent of the preemption purportedly extends only to the category of "personal wireless service facilities."

The statute goes on to specify the limits on local and state government authority over siting and planning decision regarding mobile phone services. The statute provides:

(B) Limitations. (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

Thus the statute protects the telecommunications industry from discrimination and from the arbitrary regulation of personal wireless service facilities that has the effect of preventing service. The act also sets forth requirements for timely review of applications of such facilities and for the standard of review in a challenge to a local or state government decision denying an application to place, construct or modify personal wireless service facilities.

Finally, the act addresses the limits placed on consideration of health effects from personal wireless service facilities, stating:

> (iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency

emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

It is this provision which unconstitutionally intrudes on state and local government decisions and has the effect of prohibiting a state or local government from regulating a facility if the facility complies with the FCC standards. However, the prohibition applies only to "personal wireless service facilities."

Some governmental agencies are attempting to apply this prohibition to all wireless telecommunication facilities, whether they are "personal" or otherwise. The MERA example is important because the application of the prohibition further intrudes into local decision making to a place where even the Congress did not intend. To explain why the prohibition does not apply to public wireless service facilities, one need only review the definitions in the Telecommunications Act. The definitions provide:

(C) Definitions. For purposes of this paragraph –
(i) the term "personal wireless services" means commercial mobile services, unlicenced wireless services, and common carrier wireless exchange access services;
(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and
(iii) the term "unlicenced wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v)[47 U.S.C.S. § 303(v)].

There are some key phrases in this particular section of the Act. The first is the reference in section 332(c)(7)(B)(iv) to the fact that no state or local government may regulate the placement, construction, and modification of **personal wireless service facilities** on the basis of the

environmental effects of RFR. At first glance that would seem to preclude local governments from regulating the MERA facilities on the basis of RFR effects. However, the heading for section 332(c) specifies that it relates to commercial and private mobile services. Clearly, MERA does not involve either commercial or private mobile services.

Moreover, section 332(c)(7)(C)(i) defines "personal wireless services" as commercial mobile services, unlicenced wireless services, and common carrier wireless exchange access services. Clearly, MERA does not involve commercial services and is not part of a common carrier exchange service. The MERA facilities are also required to be licensed because there is no general exemption for emergency radio systems. Therefore, section 332 of the Act does not preempt state or local governments from regulating the environmental effects of RFR from public communications services. The confusion caused by the Telecommunications Act on local decision making needs to be addressed by the Court and local authority and autonomy restored.

Conclusion

The Petition for Writ of Certiorari should be granted.

Dated: San Francisco, California
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